IN THE SUPREME COURT
Appeal from the Court of Appeals
G.R. McDonald, P.J., and J.T. Neff
and E.T.Fitzgerald, JJ.

J & J CONSTRUCTION CO,

Plaintiff - Appellant,

Docket No. 119357

vs.

BRICKLAYERS AND ALLIED CRAFTSMEN, LOCAL 1 and **MARK KING,** jointly and severally,

Defendants - Appellees.

BRIEF ON APPEAL -- APPELLEES

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COUNTER-STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

I. Does the Petition Clause of the First Amendment provide absolute immunity to Defendants-Appellees from liability for intentional interference with a business expectancy where Plaintiff J & J Construction alleged that Defendant Mark King's comments at a Wayne City Council meeting made King and his employer responsible for the Council's decision to award a contract to a bidder other than J & J Construction?

The Court of Appeals answered, "Yes."

Defendants-Appellees answer, "Yes."

Plaintiff-Appellant answers, "No."

II. Does the Petition Clause of the First Amendment provide qualified immunity to Defendants-Appellees from liability for defamation where the allegedly defamatory speech occurred at a Wayne City Council meeting where Defendants-Appellants were seeking action from the council?

The Court of Appeals answered, "Yes."

Defendants-Appellees answer, "Yes."

Plaintiff-Appellant answers, "No."

III. In addition to the Petition Clause of the First Amendment, does the federal preemption doctrine under the National Labor Relations Act provide to Defendants-Appellees absolute immunity from the claim of intentional interference with business expectancy, and qualified immunity from the claim of defamation, because Mark King's comments to Wayne City Council constituted labor dispute speech under 29 USC § 113 (c)?

The Court of Appeals answered, No."

Defendants-Appellees answer, "Yes."

Plaintiff-Appellant answers, "No."

IV. Is remand to the circuit court for reevaluation of the evidence unnecessary since the circuit court found that plaintiff-appellant suffered no injury to its reputation and since the circuit court found that Mark King's speech was uttered negligently and not with actual malice.

The Court of Appeals answered, "No."

Defendants-Appellees answer, "Yes."

Plaintiff-Appellant has not explicitly addressed this question.

STATEMENT OF JURISDICTION

Defendants-Appellees agree that this case is before this Court on leave granted, on April 30, 2002, from a decision of the Michigan Court of Appeals, issued on May 11, 2001, which reversed the judgment entered by the Wayne Circuit Court on November 7, 1997, and partially remanded the case to the trial court for a reevaluation of evidence.

INTRODUCTION

Who is responsible – legally responsible – for decisions made by government? Every day around this country, states, counties, cities, villages, townships, school boards, zoning boards, economic development commissions and other governmental bodies are presented with information from numerous sources about the decisions they must make. Where should a parking lot be located? Should a zoning variance be granted as to a parcel of property? Should a wetland be protected from development? Who should get a contract to build a municipal building? Who should get a cable television franchise? Does the area need another surgical or heart transplant facility? Should a corporation be allowed a tax exemption? This is the everyday, everywhere business of government. And the decisions the governmental bodies make significantly impact the lives of citizens and the fortunes of individuals and businesses. Those affected may besiege the government with information, opinion, and pleas. Citizens and lobbyists advocating for every interest may be as thick as flies in August. A zoning board or planning commission faced with difficult planning decisions may hear from contentious groups with diametrically opposed positions and completely conflicting facts and arguments to support them. Those who bring their opinions to government are, by definition, not disinterested. They have a position to advocate and they may do it with varying degrees of skill, honesty, integrity or rationality. It is to be expected that each will present its position in the most favorable light and that of its opponents in the least favorable one.

When all is said and done and the governmental body makes its decision, who is responsible? Can those interested parties who did not prevail sue those whose positions were accepted? Are the advocates and lobbyists – the petitioners -- legally responsible for the decisions ultimately made by government?

J and J Construction Company sought a masonry contract from the Wayne City Council. Bricklayers Union, Local 1 opposed it. The City Council considered the information it had and decided to award the contract to VanderVennet. J & J sued the union, contending it was responsible for the Council's decision denying J & J the contract. The court of appeals correctly held that the defendant had an absolute right to present its position to the City Council, protected by the First Amendment right to petition, and that it could not be held responsible -- legally liable -- when government did as it urged. To hold otherwise would undermine the very fabric of democracy, as courts, from the United States Supreme Court on down, have repeatedly recognized. The decision of the court of appeals was correct and it is essential that it be affirmed. Our republican form of government depends upon it.

There is a second issue presented in this case – a defamation issue. Do those who petition government have a duty of care to act as disinterested presenters of accurate information rather than as partisan advocates of a position? Can they be held liable for defamation if they make a negligent misstatement before a city council or other governmental body? This issue also goes to the heart of the democratic process. Government needs information from citizens and citizens need room to participate in the political process. The Petition Clause of the First Amendment requires breathing space. The court of appeals held that statements made in the course of petitioning cannot support a defamation claim unless they are made with malice -- that is, unless they are knowingly or recklessly false. This holding also must be affirmed to preserve our democratic form of government, which depends upon robust and uninhibited petition and debate from citizens, unions, and corporations alike.

STATEMENT OF FACTS AND PROCEEDINGS

I. THE FACTUAL BACKGROUND OF THIS CASE

Defendant Mark King is a business representative for the Defendant Bricklayers and Allied Craftsmen Union, Local 1 ("Bricklayers Local 1"), and a skilled bricklayer himself. He was familiar with the work of Plaintiff J & J Construction Company ("J & J"), a non-union contractor, because of comments which had been made to him by other tradesmen. He had on one occasion taken photographs of J & J's work at the Novi High School, photographs which he believed showed the poor quality of the workmanship. He was told by several workers, including two bricklayers employed by J & J, that J & J did not pay prevailing wage, and he had no reason to question their veracity. [*Appendix, pp. 035a-037a, 024b-025b, 038b-042b*]

Bricklayers Local 1 had, at various times in 1993 and 1994, picketed J & J. The picketing was to advise the public that J & J did not have an agreement with Bricklayers Local 1 and that it paid substandard wages and benefits. The picketing was also undertaken to promote the use of union signatory contractors. This is the most common reason for picketing at job sites where non-union contractors are working. Bricklayers Local 1 has regularly picketed at job sites of non-union masonry contractors. Local 1 has always been concerned with the failure of non-union contractors to pay prevailing union wages. Union contractors have difficulty competing with non-union contractors who have lower labor costs. This unfair competition causes union contractors to lose contracts and their union member employees to lose jobs. [*Appendix, pp. 050b-051b, 055b-056b*]

In 1995, the City of Wayne began planning an aquatic center (a/k/a a swimming pool). On May 31, 1995, at a public meeting, the Wayne City Council met to consider and award bids for the construction of the project. Mark King had read in a trade publication that J & J Construction was

the low bidder for the masonry work. Therefore, he went to the council meeting and briefly addressed the council. He said that Wayne was a union town and asked the council to award the masonry contract to a union contractor. Mr. King then asked three questions: whether J & J did quality work; whether it could finish the job in a timely fashion; and whether it paid prevailing wage. When he questioned the quality of its workmanship, he showed the City Council several Polaroid photos he had taken of J & J's work at Novi High School. [*Appendix, pp. 024a-027a, 019b-023b*]

Mr. King's purpose in addressing the council was to attempt to interest the Wayne City Council in investigating the issues he raised, hoping that it would decide to award the contract to a union contractor. The second lowest bidder, VanderVennet, was a union contractor. Based upon statements made to him by J & J employees that they were not receiving benefits in accordance with the prevailing wage, Mr. King believed his statements that J & J did not pay prevailing wage to be true. Also, based upon his examination of J & J's work, which he had earlier photographed, Mr. King believed that J & J's work was of poor quality -- that it should have been done differently. [*Appendix, pp. 001b-012b, 021b, 026b-037b, 039b-049b*]

The Wayne City Council voted to defer action on the masonry contract and it referred it back to the city administration. Barton Malow was the construction manager for the job, and its employee, Raymond Gabriel, the project manager, then inquired into the areas about which King had raised questions -- the quality of J & J's work and whether it paid prevailing wage. On June 15, 1995, he sent a letter to Kimberly Fallow, Recreation Director of the City of Wayne, regarding his investigation, reporting that other contractors had been satisfied with J & J's work, and appending a memo from J & J which he said showed how J & J would respond to a prevailing wage audit.

[*Appendix, pp. 001b-012b, 052b*]

Gabriel also wrote in his letter that the only problem he saw in connection with awarding the masonry contract to J & J was that if the union asked for a prevailing wage audit, the city would have to bear the costs of the audit. He told city officials that this cost would be between $2,000 and $5,000. He noted that the bid of the next lowest bidder, VanderVennet, a union contractor, was only $1,600 higher than that of J & J. In fact, a union does not have the right to request a prevailing wage audit and it would not have been able to cause the city to bear such a cost. [*Appendix, pp. 001b-012b, 018b*]

On June 20, 1995 -- three weeks after Mr. King's brief address to the council -- the Wayne City Council met again, and it again considered the masonry contracts. Gabriel's report was presented and the council voted to award the masonry contract to VanderVennet. The Council's notes, prepared later by its attorney, stated that the Council was not awarding the contract to J & J because of concerns about the quality of work and the payment of prevailing wages. [*Appendix, pp. 014b-017b*]

On August 21, 1995, Mark King addressed a meeting of the Westland City Council, which had earlier awarded a masonry contract to J & J. He asked them to reconsider, and raised the same questions he had raised at the Wayne City Council regarding J & J's work quality and wage practices. Westland did not reconsider and J & J performed that contract. [*Appendix, pp. 013b, 053b-054b*]

II. THE PROCEEDINGS BELOW

A. Allegations and Defenses

On or about August 9, 1995, Plaintiff J & J initiated this two-count action against Defendants Mark King and Bricklayers Local 1 in Wayne County Circuit Court, alleging that Mr. King's comments to the Wayne City Council defamed it and tortiously interfered with its business expectancy. Plaintiff subsequently amended its complaint to include the statements which Mr. King made in petitioning the Westland City Council.

The Defendants moved several times for summary disposition several times, on the grounds that Mr. King's petition to the Wayne City Council was privileged under the First Amendment of the United States Constitution, and also that federal labor law preempted the Plaintiff's state law claims.

The Defendants raised important defenses before trial and at trial, asserting that the claim for intentional interference with business relationship or expectancy was absolutely barred by the First Amendment, that the ***Noerr-Pennington*** doctrine of the United States Supreme Court,[1] and the Michigan court of appeals' decisions in ***Azzar*** and ***Arim***,[2] expansively applying ***Noerr-Pennington*** protection, precluded recovery. Defendants also argued that this claim was completely preempted

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[1] The ***Noerr-Pennington*** doctrine is the principle enunciated in ***Eastern Railroad Presidents Conference v Noerr Motor Freight***, 365 US 127; 81 S Ct 523; 5 L Ed 2d 464 (1961), and ***United Mine Workers v Pennington***, 381 US 657; 14 L Ed 2d 626; 85 S Ct 1585 (1965).

[2] ***Azzar v Primebank, FSB***, 198 Mich App 512; 499 NW2d 793 (1993), and ***Arim v General Motors Corp***, 206 Mich App 178; 520 NW2d 695 (1994).

by federal labor law, under ***Garmon***[3] and ***Morton***,[4] and that only federal law can be applied to determine the legality of conduct where a union is appealing to a secondary employer (here the Wayne City Council) to refrain from doing business with another employer (here J & J Construction).

The Defendants also asserted that a qualified privilege applied with regard to the claim for defamation, that they could only be held liable for defamation if the plaintiff established actual malice. The application of a qualified privilege was required for two reasons; because the speech occurred in connection with petitioning activity, ***McDonald v Smith***, 472 US 479; 105 S Ct 2787; 86 L Ed 2d 384 (1985), and ***Azzar, supra***; and also because the speech occurred in the context of a labor dispute, as the Supreme Court held in ***Linn*** and ***Austin***.[5]

B. Trial Court's Findings

The case proceeded to trial without a jury. After nine days of trial in July and August of 1997, the court below issued its bench decision in favor of the Plaintiff.

On November 7, 1997, the circuit court entered a judgment in favor of the Plaintiff on the claims of defamation and tortious interference with business expectancy, awarding damages in the amount of $57,880 and "actual costs and attorneys' fees" in the amount of $104,286.95.

The circuit court concluded that both Defendants, Mark King, and his employer, Bricklayers

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[3] ***San Diego Building Trades Council v Garmon***, 359 US 236, 239; 79 S Ct 773; 3 L Ed 2d 775 (1959).

[4] ***Teamsters, Local 20 v Morton***, 377 US 252; 84 S Ct 1253; 12 L Ed 2d 280 (1964).

[5] ***Linn v United Plant Guard Workers***, 383 US 53; 86 S Ct 657; 15 L Ed 2d 582 (1966), and ***Letter Carriers v Austin***, 418 US 264; 94 S Ct 2770; 41 L Ed 2d 745 (1974).

Local 1, were liable on both claims -- tortious interference with business relationship or expectancy, and negligent defamation. [*Appendix, pp. 083a, 087a*]

The court's factual findings are important, as they are undisputed. The court first examined the three questions presented by Defendant Mark King to the Wayne City Council -- questions which the court described as statements. The court concluded that the statement that J & J did not pay prevailing wage was not false [*Appendix, pp. 075a-077a*]; that the statement that J & J would have trouble getting a job finished on time was false, and that it was negligently made because Mr. King had not sufficiently investigated the circumstances in which J & J had subcontracted to another contractor in order to finish a job. [*Appendix, pp. 074a-075a, 083a*]

With regard to the statement that there were problems with the quality of work done by J & J, a statement supported by the photos shown to the City Council, the court concluded that the statement was false. [*Appendix, p. 074a*] The court did not find that Mr. King knew the statement to be false. The court did not discredit Mr. King, who testified that he believed the brick and block work done by J & J were of poor quality. [*Appendix, pp. 039b-049b*] Rather, the court found that Mr. King had not investigated sufficiently to determine whether work which appeared unsatisfactory to him was acceptable to the project superintendent; whether the superintendent had directed the work to be done in the manner shown in the photos; or whether there were some construction difficulties which accounted for the problematic appearance of parts of the job. The court further found that the photographs were misleading because they showed only a small portion of the job, and did not give an accurate or representative picture of the total job. [*Appendix, pp. 072a-073a, 083a-084a*]

In sum, the court concluded that, "these photographs and the statements that were made were

made negligently in terms of the defendant's failure to pursue and check the accuracy of what was being represented to the city council." [*Appendix, pp. 083a-084a*]

The court held that neither an absolute nor a qualified privilege applied and found that the statements negligently made by Mark King "caused" the Wayne City Council to award the masonry contract for its aquatic center to VanderVennet rather than to J & J Construction Company. [*Appendix, p. 084a*]

Importantly, the court held that there was no proof of injury to J & J's reputation and refused to find defamation or to order damages with regard to a subsequent petition to the Westland City Council, which did award a contract to J & J. Also, the court awarded neither punitive nor exemplary damages, as there was no finding that Mr. King made any defamatory statements with malice. The court found that the only "injury" J & J suffered was the loss of its anticipated profit from the Wayne Aquatic Center contract, which it calculated to be $57,888.00 and held both defendants liable for that amount, together with attorneys fees, costs, and interest, for a total amount of $188,219.46. [*Appendix, pp. 087a-089a*] On October 30, 1997, the Defendants moved for a stay of the judgment pending this appeal and posted a bond pursuant to MCR 7.209. On November 18, 1997, the court below granted the stay.

Defendants appealed the judgment to the Michigan Court of Appeals.

C. Court of Appeals Decision

On May 11, 2001, the Court of Appeals issued its decision, reversing the judgment in part and remanding in part. Regarding the allegation that the Defendants had tortiously interfered with Plaintiff's business expectancy, the Court of Appeals held that the Defendants' conduct – petitioning a governmental body – was protected by an absolute privilege, relying upon the ***Noerr-Pennington***

petitioning immunity doctrine, but rejecting the defendants' alternative argumnent for dismissal – that the claim was completely preempted by the National Labor Relations Act.

The court rejected the plaintiff's argument that there was some "commercial exception" to the ***Noerr-Pennington*** doctrine, finding that the few appellate court cases which so held had been long since rejected by the weight of authority and also that such an exception was impossible to apply, and impliedly contrary to public policy.

As to the defamation count, the court of appeals concluded that Mark King's speech made in the course of petitioning the city council was protected by a qualified privilege – that is, that the actual malice standard articulated by the United States Supreme Court in ***New York Times v Sullivan***, 376 US 254; 84 S Ct 710; 11 L Ed 2d 686 (1964), was applicable, and that the defendants could be found liable only if the statements made were knowingly or recklessly false. The court held that liability could not be imposed based on simple negligence, the standard which had been used by the trial court.

The court of appeals remanded the case to the circuit court to "reevaluate" the evidence in light of the proper standard – actual malice rather than negligence, even though the circuit court had specifically found that King's speech was negligent and that there was no actual malice.

ARGUMENT

> The First Amendment provides, in relevant part, that "Congress shall make no law . . . abridging . . . the right of the people . . . to petition the Government for a redress of grievances." We have recognized this right to petition as one of "the most precious of the liberties safeguarded by the Bill of Rights." ***Mine Workers v Illinois Bar Assn.,*** 389 US 217, 222 (1967), and have explained that the right is implied by "[t]he very idea of a government, republican in form." ***United States v Cruikshank***, 92 US 542 (1876). ***BE & K Construction Co v NLRB***, 536 US___ (2002).

I. THE CLAIM FOR INTENTIONAL INTERFERENCE WITH PROSPECTIVE BUSINESS RELATIONSHIP OR EXPECTANCY WAS BARRED BY FIRST AMENDMENT PETITIONING IMMUNITY - *NOERR-PENNINGTON* IMMUNITY. THOSE WHO PETITION GOVERNMENT CANNOT BE HELD LIABLE TO THIRD PARTIES AGGRIEVED BY GOVERNMENTAL ACTIONS.

A. Standard of Review

Defendants-Appellees agree with the Plaintiff-Appellant that the standard of review applicable to the issues presented in this case is *de novo.*

B. Summary of Argument

The right of citizens to petition government is a cornerstone of our democratic form of government. To protect this most fundamental right, the courts have developed the doctrine of petitioning immunity and have said that when citizens petition government they are absolutely immune from claims by which others seek to hold them liable for the actions of government. The ***Noerr-Pennington*** doctrine, developed in the antitrust context has been applied to give absolute protection to petitioning, in any cause of action brought seeking damages for the governmental decisions resulting from petitioning. The decisions of government are the responsibility of government – not of those who petition government to act in one way or another.

The United States Supreme Court, the Circuit Courts of Appeal, and the Michigan Court of Appeals have all repeatedly recognized that the Petition Clause provides absolute immunity to the petitioner. The courts have repeatedly recognized that public policy supports this conclusion. To allow a cause of action for lobbyists' liability would multiply litigation, enmesh legislators and other government officials in discovery and trial, discourage political participation and deprive government of necessary input from citizens. To say that citizens' petitioning activity "causes" the actions of government also runs afoul of Michigan case law on causation.

Finally, we will show that Plaintiff-Appellant's claim for tortious interference with business expectancy is preempted by the National Labor Relations Act, which protects the right of a union to ask a secondary employer to cease doing business with a primary employer.

C. The *Noerr-Pennington* doctrine of petitioning immunity has been developed to insure that persons who petition government are absolutely immune from liability for the actions which government take.

The doctrine of First Amendment petitioning immunity -- referred to as the ***Noerr-Pennington*** doctrine -- derives from the United States Supreme Court's decisions in ***Eastern Railroad Presidents Conference v Noerr Motor Freight***, 365 US 127; 81 S Ct 523; 5 L Ed 2d 464 (1961), and ***United Mine Workers v Pennington***, 381 US 657; 85 S Ct 1585; 14 L Ed 2d 626 (1965). In *Noerr*, a number of railroad defendants were sued by trucking companies who contended that the railroads' lobbying for legislative action which would be beneficial to them and detrimental to the trucking companies violated the Sherman Antitrust Act. The Court held that this petitioning activity could not constitute an antitrust violation. Recognizing that citizens frequently petition and lobby for legislative actions which can result in a restraint of trade, the Court said that such legislative actions were the responsibility of the legislature, not of the persons who sought to

influence the legislature or who requested it to act. Furthermore, the Court noted that the Sherman Act regulated business activity, not political activity, and said that if the antitrust law were to be construed to limit political activity such as petitioning government, it would probably be an unconstitutional invasion of the right of petition. Thus, the constitutional source of the ***Noerr*** doctrine was recognized from its inception.

Subsequently, in ***Pennington***, *supra*, the Court considered the legality of an alleged agreement between the United Mine Workers and large coal mine operators to raise wages by driving small coal mine operators out of business. It was claimed that in order to achieve this allegedly unlawful goal the United Mine Workers and the mine operators sought particular administrative rulings or actions from the Secretary of Labor and the Tennessee Valley Authority. The court relied upon ***Noerr*** for the proposition that the Sherman Act could not prohibit an effort to influence public officials, regardless of the anti-competitive purpose or motive of the persons seeking governmental action, stating, "Joint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition." ***Pennington***, 381 US at 670. Furthermore, the Court observed that the plaintiff could collect no damages from the defendants for any injury which it suffered as a result of actions taken by the Secretary of Labor.

The ***Noerr-Pennington*** doctrine, thus, stands for the proposition that parties aggrieved by some governmental action cannot recover damages from those who petitioned for or urged such governmental action. As the Court in ***Noerr*** correctly recognized:

> In a representative democracy such as this, these branches of government act on behalf of the people and, to a very large extent, the whole concept of representation depends upon the ability of the people to make their wishes known to their representatives. To hold that the government retains the power to act in this representative capacity and yet hold, at the same time, that the people cannot freely

> inform the government of their wishes would impute to the Sherman Act a purpose to regulate, not business activity, but political activity, a purpose which would have no basis whatever in the legislative history of that Act. Secondly, and of at least equal significance, such a construction of the Sherman Act would raise important constitutional questions. The right of petition is one of the freedoms protected by the Bill of Rights, and we cannot, of course, lightly impute to Congress an intent to invade these freedoms. ***Noerr,*** 381 US at 137-138.

Rejecting attempts to limit the ***Noerr-Pennington*** doctrine to the legislative or political context, the Supreme Court in ***California Motor Transport Co v Trucking Unlimited***, 404 US 508; 92 S Ct 609; 30 L Ed 2d 642 (1972), held that the ***Noerr-Pennington*** doctrine – absolute protection for petitioning activity -- applied to petitioning activity directed to all branches of government -- to administrative agencies and courts as well as to legislative bodies -- stating:

> We conclude that it would be destructive of rights of association and of petition to hold that groups with common interests may not, without violating the antitrust laws, use the channels and procedures of state and federal agencies and courts to advocate their causes and points of view respecting resolution of their business and economic interests vis-a-vis their competitors. *Id.* at 510-511.

The Supreme Court has continued to develop and discuss the ***Noerr-Pennington*** doctrine in a number of important cases over the years. In ***Allied Tube & Conduit Corp v Indian Head, Inc***, 486 US 492; 108 S Ct 1931; 100 L Ed 2d 497 (1988), the Court held that ***Noerr-Pennington*** did not immunize a concerted effort to influence a standard setting trade association, since the association was not a governmental body, concluding:

> [W]e reject petitioner's argument that any efforts to influence the Association must be treated as efforts to influence a 'quasi-legislature' and given the same wide berth accorded legislative lobbying. *Id.* at 504.

By way of contrast, where the action was a governmental action, however, the Court stated definitively that:

> "Where a restraint upon trade or monopolization is the result of valid governmental

> action, as opposed to private action," those urging the governmental action enjoy absolute immunity from antitrust liability for the anticompetitive restraint. *Id.* at 499. (Quoting ***Noerr*** at 136.)

In ***Columbia v Omni Outdoor Advertising***, 499 US 365; 111 S Ct 1344; 113 L Ed 2d 382 (1991), the Court held that ***Noerr-Pennington*** petitioning immunity absolutely privileged the effort by one company to secure legislation disadvantageous to a competitor. In that case, Omni Outdoor Advertising sued Columbia Outdoor Advertising and the City of Columbia, South Carolina, because Columbia Outdoor Advertising had successfully lobbied city officials to enact zoning ordinances restricting billboard construction. The Court rejected an argument that there is a "conspiracy exception" to the ***Noerr-Pennington*** or ***Parker*** doctrines[6], assertedly applicable when governmental action results from some "corrupt conspiracy" between private parties and governmental officials. The Court emphasized that the **only** exception to ***Noerr-Pennington***, the "sham" exception, is limited to those situations where the petitioning activity is not actually intended to induce governmental action. The Court also observed that the manner by which the private party persuaded government to act was immaterial, quoting from ***Noerr*** to write that:

> In Noerr itself, where the private party 'deliberately deceived the public and public officials' in its successful lobbying campaign, we said that 'deception, reprehensible as it is, can be of no consequence so far as the Sherman Act is concerned. ***Columbia*** at 384-385, quoting ***Noerr*** at 145.

Later in ***Professional Real Estate Investors v Columbia Pictures***, 508 US 49; 113 S Ct

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[6] In ***Parker v Brown***, 317 US 341; 63 S Ct 307; 87 L Ed 315 (1943), the Court held that the Sherman Act did not apply to an anticompetitive restraint imposed as an act of government. In ***Columbia Outdoor Advertising***, 499 US at 383, the Court noted that ***"Parker*** and ***Noerr*** are complementary expressions of the principle that the antitrust laws regulate business, not politics; the former decision protects the States' acts of governing, and the latter the citizens' participation in government."

1920; 123 L Ed 2d 611 (1993), the Court, in applying the ***Noerr-Pennington*** doctrine in the context of litigation -- petitioning the judicial branch -- set forth the tests to determine whether litigation is undertaken as a "sham" so as to deprive it of ***Noerr-Pennington*** absolute immunity, the tests relating to the objectively measured merit of the lawsuit and the subjective motivation for bringing it. The Court also observed that when petitioning the judicial branch or any other branch of government, petitioning cannot constitute a "sham" if it succeeds in convincing the government to take the action requested.

Most recently, in ***BE & K Construction Co v NLRB***, 536 US____; 122 S Ct 2390; 153 L Ed 2d 499 (2002), the Court summarized its petitioning immunity cases, noting that it had been applied outside of the antitrust context, and held that the ***Professional Real Estate Investors*** test to establish when litigation was a sham was applicable in an NLRA case dealing with litigation initiated by an employer against a union in retaliation for the union's exercise of protected rights. Emphasizing the centrality of the right of petition, the Court held that, as in ***PREI***, the act of litigating could not be held unlawful simply because it was unsuccessful but could only be punished if it was both objectively baseless and unlawfully motivated.

D. Michigan courts have previously recognized that *Noerr-Pennington* absolute immunity is necessary to protect the constitutional right to petition government and have relied upon it to dismiss suits alleging various tort claims.

In two cases before the instant case, ***Azzar v Primebank, FSB***, 198 Mich App 512; 499 NW2d 793 (1993), and ***Arim v General Motors Corp***, 206 Mich App 178; 520 NW2d 695 (1994), the Michigan court of appeals held that First Amendment petitioning is protected by absolute immunity. In ***Azzar***, the plaintiffs sued defendants for breach of fiduciary duty, contending that their communications to the Federal Home Loan Bank Board ("FHLBB") had caused the FHLBB to deny

approval of the plaintiffs' request to purchase additional shares of the defendants' stock. The court affirmed the lower court's summary dismissal of the action, stating:

> The right to petition, as guaranteed by the First Amendment of the United States Constitution, protects the right of the people to inform their representatives in government of their desires with respect to the passage or enforcement of laws, regardless of their intent in doing so.
>
> . . .
>
> Accordingly, unless the petitioning is a sham, the knowing infliction of injury from petitioning does not render the campaign illegal because to hold otherwise would be tantamount to outlawing all such campaigns.
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> . . .
>
> [T]he ***Noerr-Pennington*** doctrine is a principle of constitutional law that bars litigation arising from injuries received as a consequence of First Amendment petitioning activity, regardless of the underlying cause of action asserted by the plaintiffs. Thus, we agree with the circuit court that the defendants' actions in petitioning the FHLBB constituted an attempt to influence governmental action that was immune from liability under the First Amendment. ***Azzar***, *supra* at 516-517. (Citations omitted.)

The very next year, in ***Arim v General Motors***, *supra*, the appeals court considered suits alleging antitrust violations, intentional infliction of emotional distress, fraud, injurious falsehood, and tortious interference with contractual relations, brought by transmission repair shops against General Motors, in which plaintiffs contended that statements General Motors had made to the State Bureau of Auto Regulation during a fraud investigation had caused the state to revoke plaintiffs' business licenses.

The court affirmed the dismissal of the actions on the basis of First Amendment immunity under the ***Noerr-Pennington*** doctrine. Quoting from ***Video Int'l Production, Inc. v Warner-Amex Cable Communications, Inc***, 858 F2d 1075, 1082 (CA 5, 1988), cert den sub nom ***City of Dallas v Video Int'l Productions, Inc***, 470 US 1047 (1989), the court explained that ***Noerr-Pennington*** petitioning immunity meant as follows:

> . . . that parties who petition the government for governmental action favorable to them cannot be prosecuted under the antitrust laws even though their petitions are motivated by anticompetitive intent. ***Arim***, *supra* at 189.

Again quoting from ***Video Int'l***, *supra* at 1084, the Court continued that:

> Although the ***Noerr-Pennington*** doctrine initially arose in the antitrust field, other circuits have expanded it to protect first amendment petitioning of the government from claims brought under federal and state laws, including section 1983 and common-law tortious interference with contractual relations . . . There is simply no reason that a common-law tort doctrine can any more permissibly abridge or chill the constitutional right of petition than can a statutory claim such as antitrust. [Citations omitted.] ***Arim***, *supra* at 191.

Thus, the court of appeals in the instant case, was following well-established authority from the United States Supreme Court and from Michigan courts when it concluded as follows:

> That lobbying for favorable political action is an inherent part of the nature of government, and of the fabric of our society, should be too obvious to require citation. Also self-evident is that such lobbying characteristically includes placing one's interests in the best light and trying to place a rival's interests in the worst possible light. The right to petition government should immunize any petitioner from liability for the resulting actions of government, not just objective and fair-minded petitioners who disclose all motives behind their campaigns. ***J & J Construction Co v Bricklayers, Local 1***, 245 Mich App 722, 732; 631 NW2d 42 (2001.)

E. The overwhelming weight of judicial authority holds that those who petition government are absolutely immune from liability for injuries resulting if government takes the action they seek. This petitioning immunity has come to be known as *Noerr-Pennington* immunity even outside of the antitrust context in which the doctrine was developed.

Plaintiff J & J correctly points out, as do the cases discussed herein, the obvious fact that the ***Noerr-Pennington*** doctrine was developed in antitrust cases. However, the Supreme Court made it clear from the outset that it interpreted the Sherman Act to be inapplicable to petitioning activity at least in part because the First Amendment protected such activity. It interpreted the Sherman Act as it did so as to avoid holding it unconstitutional. Many courts, including the Michigan court of

appeals in the cases discussed above, have recognized this and have used the term ***Noerr-Pennington*** immunity to describe petitioning immunity which arises in a non-antitrust context.

Cardtoons LC v Major League Baseball Players Assoc, 208 F3d 885 (CA 10, 2000), a case cited by Plaintiff J & J, discusses the Supreme Court's recognition of the constitutional origin of the ***Noerr-Pennington*** doctrine, discusses cases in which the Supreme Court has itself applied petitioning immunity in non-antitrust contexts,[7] and then observes that, "The circuits have followed suit, eliminating the Sherman Act rationale outside of antitrust and focusing solely on the petition clause." *Id.* at 889.

The court in ***Cardtoons*** did observe that it was "a bit of a misnomer" to refer to First Amendment petitioning immunity outside of the antitrust context as ***Noerr-Pennington*** immunity, suggesting that there might be some cases in which the two types of immunity would not be completely interchangeable. That was the conclusion in that case, where the court split on the question of whether pre-litigation threats to sue were protected by petitioning immunity, the majority concluding that the pre-litigation threats could not be called petitioning and so were not protected by the First Amendment.

However, there is no issue in the instant case about whether the defendants were involved in petitioning activity. And the analysis in ***Cardtoons*** fully supports the conclusion of the court of appeals in the instant case, whether one uses the term *"**Noerr-Pennington*** immunity" to refer to the protection accorded by the First Amendment or simply refers to the protection as First Amendment

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[7] *See* ***Bill Johnson's Restaurants, Inc v NLRB***, 461 US 731; 103 S Ct 2161; 76 L Ed 2d 277 (1983), and ***NAACP v Claiborne Hardware***, 458 US 886; 102 S Ct 3409; 73 L Ed 2d 1215 (1982).

petitioning immunity.

The decision of the court of appeals is also supported by the overwhelming weight of authority, by numerous cases from the federal circuits, from federal district courts, and from other states, as well as by the Michigan cases discussed above. These cases apply petitioning immunity in a wide variety of contexts, but all of them have the same outcome. One who exercises his First Amendment right to petition government cannot be held liable for the governmental decisions and actions which may ensue. *See* ***Bayou Fleet, Inc v Alexander, et al***, 234 F3d 852, 861 (CA 5, 2000), *cert den* 532 US 905; 121 S Ct 1228; 149 L Ed 2d 138 (2001) (affirming dismissal of suit contending that defendants' lobbying efforts regarding zoning constituted state unfair trade practices, a violation of the Sherman Act and an unlawful conspiracy under 42 USC §1983)("The Supreme Court has clearly stated that efforts to influence public officials will not subject individuals to liability, even when the sole purpose of the activity is to drive competitors out of business . . . The Court has allowed only one exception to the ***Noerr-Pennington*** doctrine – the 'sham' exception."); ***Davric Maine Corp v Rancourt***, 216 F3d 143, 147 (CA 1, 2000)(holding that defendants' lobbying efforts before Harness Racing Commission, state legislature and courts could not be basis for liability as they were all protected by ***Noerr-Pennington*** immunity doctrine)("Even *false* statements presented to support such petitions are protected."); ***Manistee Town Center v City of Glendale***, 227 F3d 1090 (CA 9, 2000)(observing that ***Noerr-Pennington*** petitioning immunity was applicable outside of the antitrust context, Ninth Circuit affirmed dismissal of case alleging that City of Glendale violated § 1983 by lobbying Maricopa County not to lease space in plaintiff shopping center); ***TEC Cogeneration Inc v Florida Power & Light Co***, 76 F3d 1560 (CA 11, 1996), *partially modified on other grounds*, 86 F3d 1029 (substituting three paragraphs irrelevant to the instant analysis)(holding

that ***Noerr-Pennington*** doctrine provided absolute immunity for lobbying activity, and that Florida Power and Light had a constitutional right to petition its governing legislative body, Eleventh Circuit affirmed dismissal of suit alleging unlawful anticompetitive activities arising out of Florida Power's successful lobbying of governmental commission to prevent construction of power transmission line which plaintiffs were lobbying for).

Noerr-Pennington immunity was relied upon in ***Sessions Tank Liners, Inc v Joor Mfg, Inc***, 17 F3d 295 (CA 9, 1994), where the plaintiff alleged not only federal antitrust violations but also the California tort of intentional interference with prospective economic advantage. In that case the plaintiff's business was adversely affected when a number of jurisdictions adopted Uniform Fire Code standards banning tank relining, which was the essence of plaintiff's business. The ban had been urged on the fire code drafting body by the defendant, which was in the business of installing new tanks. The Ninth Circuit held that defendant Joor's conduct, in successfully urging the ban on tank lining, was protected from antitrust liability by the ***Noerr-Pennington*** doctrine. Regarding the antitrust claim, the Ninth Circuit concluded:

> Because the only anticompetitive injuries that Sessions complains of are the direct result of governmental action, we conclude that Joor is shielded from liability for these injuries by petitioning immunity. *Id.* at 301.

As to the state court tort claim for intentional interference with prospective economic advantage (the same claim as was brought in this case by J & J Construction), the court held that the same policy considerations applied to this claim as applied in ***Noerr*** and the subsequent antitrust cases, stating:

> We conclude, therefore, that the California courts would not permit recovery in this case for tortious interference with prospective economic advantage, where the damages all flow from governmental decisions of disinterested public officials. *Id.* at 302.

A review of the cases in this area shows the everyday interactions of businesses and governmental authorities, dealing with such issues as zoning, leasing, building locations, medical facility certificate of need grants, contract awards, infrastructure improvements, and construction standards. In each of these a business which did not like a governmental action, and which was in most instances the unsuccessful lobbyist, sued the successful lobbyist for causing the government action. Recognizing that to allow such suits would be destructive of the very foundation of democratic government, the courts have dismissed these suits. *See* ***Boone v Redevelopment Agency of City of San Jose***, 841 F2d 886 (CA 9, 1988) (developers sued another developer and various city agencies and officials because of city council decision not to build parking garage at plaintiff's preferred location, alleging, inter alia, that defendant had developed close relationships with city officials, had secret meetings with them, and made false reports and misrepresentations to council. Court concluded that all this activity was essence of lobbying, was all protected by ***Noerr-Pennington*** petitioning immunity, and, with regard to alleged false representations to city council; said that council acting in the political sphere could be trusted to accommodate false statements and reveal their falsity); ***Oberndorf v City and County of Denver***, 900 F2d 1434 (CA 10, 1990) (property owners brought action against city, various city officials, and a developer, challenging an urban renewal project; Court dismissed all claims, including those against developer, holding that developer's use of channels and procedures of government to advocate its business and economic interests was protected by ***Noerr-Pennington*** petitioning immunity); ***Suburban Restoration Co v Amcat Corp and Laborers' Local 665***, 700 F2d 98 (CA 2, 1982)(Unsuccessful bidder for asbestos removal work, together with union, sued city challenging award of the bid to Plaintiff Suburban. When first lawsuit was settled with agreement to rebid the project, and in second round Suburban

did not get contract, it sued Amcat and Laborers Local 665 for interference with business expectancy. Court affirmed dismissal of state court claims, concluding that ***Noerr-Pennington*** doctrine was constitutional doctrine which protected the defendants' actions); ***Brownsville Golden Age Nursing Home, Inc v Wells***, 839 F2d 155, 160 (CA 3, 1988)(Based on ***Noerr-Pennington*** immunity, court affirmed dismissal of suit against state officials, a United States Senator, and individuals, alleging civil conspiracy to interfere with present and prospective business relations brought by nursing home operator who contended that defendants' complaints about home to state and federal officials caused loss of its license.)("The rule that liability cannot be imposed for damage caused by inducing legislative, administrative, or judicial action is applicable here"); ***Herr v Pequea Township, et al***, 274 F3d 109 (CA 3, 2001) (affirming dismissal of § 1983 suit brought by landowner who sued township and its supervisors for their attempts through petitions to other authorities to keep him from building industrial park)("Both the Constitution and the common law provide protection for those who petition government"). Also from the Third Circuit, *see* ***A.D. Bedell Wholesale Company, Inc v Phillip Morris Inc***, 263 F3d 239 (CA 3, 2001); ***Barnes Foundation v Township of Lower Merion***, 242 F3d 151 (CA 3, 2001); and ***WE, Inc v City of Philadelphia***, 174 F3d 322 (CA 3, 1999).

Much litigation has arisen out of the certificate of need administrative process, whereby states attempt to control medical costs by preventing unnecessary duplication of medical facilities. *See* ***Kottle v Northwest Kidney Centers***, 146 F3d 1056 (CA 9, 1998)(affirming dismissal of suit in which it was alleged that defendant's misrepresentations and improper and unlawful lobbying in administrative proceedings led to denial of certificate of need for plaintiff to open kidney dialysis center)("Misrepresentations are a fact of life in politics . . . and lobbying is the sine qua non of

democracy"); ***Potters Medical Center v City Hosp Ass'n***, 800 F2d 568, 578 (CA 6, 1986)(affirming dismissal, Sixth Circuit held that defendant's conduct was protected by ***Noerr-Pennington*** petitioning immunity, where plaintiff, which was denied certificate of need and state reimbursement eligibility, sued hospital association for violating antitrust laws by opposing its applications)("In ***Noerr*** and ***Pennington***, the Supreme Court held that attempts to influence the legislative process, even if prompted by an anticompetitive intent, are immune from antitrust liability. This doctrine rests on two grounds: the First Amendment's protection of the right to petition the government, and the recognition that a representative democracy, such as ours, depends upon the ability of the people to make known their views and wishes to the government."); ***Armstrong Surgical Center, Inc. v Armstrong County Memorial Hosp***, 185 F3d 154 (CA 3, 1999)(affirming dismissal of suit brought by surgical center after it was denied a certificate of need to open new facility, alleging that hospital and doctors had violated antitrust laws by, inter alia, providing false information to the regulatory authorities)("[W]here, as here, all of the plaintiff's alleged injuries result from state action, antitrust liability cannot be imposed on a private party who induced the state action by means of concerted anticompetitive activity.")

The Fifth Circuit has broadly applied the ***Noerr-Pennington*** petitioning immunity doctrine in a number of cases, including ***Greenwood Utilities Comm'n v Mississippi Power Co***, 751 F2d 1484 (CA 5, 1985); ***Independent Taxicab Drivers Employees v Greater Houston Transp Co***, 760 F2d 607 (CA 5, 1985); and ***Video Int'l Prod, Inc v Warner-Amex Cable Communications, Inc***, 858 F2d 1075 (CA 5, 1988), *cert den* 490 US 1047; 109 S Ct 1955; 104 L Ed 2d 424 (1989).

F. There is no "commercial exception" to the *Noerr-Pennington* doctrine.

Appellant argues that there is a "commercial exception" to ***Noerr-Pennington*** immunity and

that the court of appeals erred in failing to recognize this exception. Plaintiff's argument for this "commercial exception" relies heavily on a 1971 case, ***George R. Whitten, Jr, Inc v Paddock Pool Builders, Inc***, 424 F2d 25 (CA 1, 1970), and two federal appellate court cases which followed it, ***Hecht v Pro Football, Inc***, 444 F2d 931 (CA DC, 1971), and ***Israel v Baxter Laboratories, Inc***, 466 F2d 272 (CA DC, 1972). Both ***Whitten*** and ***Hecht*** were decided before the Supreme Court's decision in ***California Motor Transport***, and ***Israel*** very shortly after. Each of the cases assessed the then-existing, and very undeveloped, state of the ***Noerr-Pennington*** doctrine and each concluded that the doctrine was being narrowly applied. Subsequent Supreme Court cases, as well as numerous cases in the Courts of Appeal and other courts, some of them discussed above, have very broadly applied the ***Noerr-Pennington*** doctrine, repeatedly recognizing that the only exception is the sham exception, that the sham exception applies only to petitioning activity which is not genuinely undertaken to affect governmental decisions but is rather undertaken to harass business competition, and that the sham exception is altogether inapplicable when the petitioning activity is successful.

The cases on which Appellant relies have been completely discredited by subsequent Supreme Court authority and specifically rejected by more recent judicial authority and by commentators. *See, e.g.*, ***In Re Airport Car Rental Antitrust Litigation***, 693 F2d 84, 88 (CA 9, 1982) ("There is no commercial exception to ***Noerr-Pennington***."), and ***Greenwood Utilities Commission v Mississippi Power Co***, 751 F2d 1484, 1505, n 14 (CA 5, 1985) ("We agree with the Ninth Circuit that there should be no commercial exception to ***Noerr-Pennington***....").

The so-called "commercial exception" seems to derive from a misapplication of a principal set forth in earlier cases, including ***Parker, supra,*** in which the courts held that ***Parker*** immunity might be unavailable if the government were acting as a market participant, that is, as a competitor

in the provision of goods or services. It is obvious that a government power plant could not lawfully combine with private power plants to monopolize the production and distribution of power. That principle is inapplicable when the government is consuming rather than producing, and, as the court of appeals correctly pointed out, the commercial exception urged by Appellant J & J is incapable of any principled or consistent application.

G. The decision of the court of appeals is supported by sound public policy.

1. Government is responsible for its own actions and it cannot be said that a petitioner "caused" the government to act.

In ***Antitrust Law***, Areeda and Hovenkamp, 1996 Supplement, Professors Areeda and Hovenkamp, citing ***Sessions***, *supra,* observed that the ***Noerr*** rule was predicated first on the need to protect the constitutional right to petition but also observed as follows:

> The ***Noerr*** result is also supported by a second powerful reason: the injury of which the antitrust plaintiff complains was proximately "caused" by the government itself. To be sure, private parties may have influenced or persuaded the government to act, but the government's decision to act reflects an independent governmental choice, constituting a supervening "cause" that breaks the link between a private party's request and the plaintiff's injury. 1996 Supplement, ¶ 201.

In ***Sessions,*** *supra,* at 300, the Ninth Circuit emphasized that the injuries for which Sessions sought compensation -- the loss of business -- "flowed directly from government action," and observed that:

> To rule otherwise (than to find absolute immunity) and hold Joor liable for injuries flowing from governmental decision makers' imposition of an anti-competitive restraint, we would have to find that the restraint was imposed *because of* Joor's petitioning efforts. Proof of causation would entail deconstructing the decision-making process to ascertain what factors prompted the various governmental bodies to erect the anticompetitive barriers at issue. This inquiry runs afoul of the principles guiding the ***Parker*** and ***Noerr*** decisions. (Emphasis in original.) *Id.*

In the instant case, the court of appeals correctly recognized the significance of this causation problem, citing ***Sessions***. It noted that the Wayne City Council meeting minutes stated that plaintiff J & J's bid was rejected because of concerns regarding the quality of its workmanship and because of concerns regarding its payment of prevailing wage. The trial court found the statement regarding workmanship to have been negligently false. However, it found that the statement regarding payment of prevailing wage was not false. The court of appeals asked which of these reasons tipped the balance.

Many other questions come to mind. If different council members had different motivations, how would these differing motivations be assessed? Moreover, the record shows that after Mark King addressed the Wayne City Council, the council deferred a decision and asked its construction manager to investigate the questions raised by Mr. King. The construction manager wrote that if the union requested a prevailing wage audit the cost of the audit would exceed the difference between J & J's bid and that of the next lowest bidder. In fact, a union has no ability to request a prevailing wage audit. The City of Wayne would not have had to bear this auditing expense. Could this inaccurate statement from the city's construction manager have been the statement which caused the city to reject J & J's bid? What if several persons addressed a city council? What if no single petition sealed the decision but each contributed something? What if each decision maker was influenced by a different argument? Would the court be called upon to apportion liability to someone aggrieved by the decision in accordance with a determination as to degree of responsibility for the decision? Would the defendant be required to implead all of the other lobbyists who had addressed the issue? These are simply a few of the questions that could be asked.

Michigan courts have quite properly recognized that governmental action is the responsibility

of the governmental body, and not of those who seek such action. In ***Mayor v Ku Klux Klan (Aft Remand)***, 222 Mich App 637; 564 NW2d 177 (1997), *cert den*, 524 US 904; 118 S Ct 2061; 141 L Ed 2d 138 (1998), the Lansing mayor had filed suit against the Ku Klux Klan and had succeeded in getting an injunction to prevent it from holding a rally on the grounds of the capital in Lansing. The appellate court dissolved the injunction on the ground that it was unconstitutional. The Klan filed a § 1983 counterclaim against the mayor of Lansing, alleging that by seeking the injunction the mayor had caused the court to violate its constitutional rights. The court of appeals observed that the "cause" of the constitutional violation was the court's issuance of the injunction, not the mayor's seeking it, and wrote further that:

> The law itself is responsible for the consequences of its operation, not the litigant who avails himself of that law. Moreover, a rule that transforms judicial error into a basis for tort liability by an adversely affected litigant would chill legitimate access to courts. The First Amendment right to petition the government has been construed to implicate the right of access to courts for redress of wrongs. 222 Mich App at 647.

The court went on to observe that:

> The proposition that a party is 'responsible for the natural consequences of his actions' is limited where subsequent, independent factors are more proximately responsible for the consequences. . . [G]enerally, in the absence of misconduct by a party that taints the process and the independence of subsequent decision-makers, what emerges from the legal process is more directly a consequence of the dictates of the law than the conduct of a litigant. *Id.* at 652.

Similarly, what emerges from the legislative process or from a city council's deliberative process cannot be attributed to the conduct of a lobbyist or a petitioner. It has often been said that the two things one should not want to see made are sausage and legislation. The ingredients are many and some of them may be distasteful, but the product, whether it be sausage, or law, or the award of a contract to perform masonry work, cannot be attributed to anyone who provides input or

ingredients.

This Court carefully considered the issue of causation in its decision in ***Robinson v City of Detroit***, 462 Mich 439; 613 NW2d 307 (2000). In that case, the plaintiffs, whose decedents were killed in accidents with cars being chased by police cars, sought to impose liability on the city and the police officers who were giving chase, contending that the assertedly negligent police chase was the proximate cause of the wrongful deaths. This Court held as a matter of law that the individual police officers were immune from liability because their actions "were not 'the proximate cause,' i.e., the one most immediate, efficient, and direct cause of the passengers' injuries." Events or actors more removed in the chain of causation could not be held liable for the ultimate result, even if they provided the first link or a necessary link in the chain.

The court of appeals in the instant case similarly, and correctly, recognized that a legislature or city council is responsible for the consequences of its actions. The citizen who avails himself of his First Amendment rights and petitions the government for some action is not the "proximate cause" of that action.

2. To hold petitioners liable for the actions of government would require examination of the motivation of the governmental actors involved - - an inquiry which this court has said must be avoided -- and would enmesh government officials in discovery and trial.

In the instant case, the defendants, believing, with what turned out to be an unwarranted degree of confidence, that ***Noerr-Pennington*** petitioning immunity would preclude liability, did not depose or call as witnesses the Wayne City Council members or other city employees. However, if this Court were to reject the conclusion of the court of appeals, and hold that a petitioner may be held liable for government action which it urged, then it can readily be anticipated that governmental

decision makers will, as the ***Sessions*** decision pointed out, have their decisions dissected and their motivations laboriously examined, first in discovery and then at trial.

This Court has repeatedly emphasized that it will not concern itself with the motivation of a legislative body when considering the validity of legislation. ***Michigan United Conservation Clubs, et al, v Secretary of State, et al,*** 464 Mich 359; 630 NW2d 297 (2001) (opinion of Justice Corrigan); ***Kuhn v Dep't of Treasury***, 384 Mich 378, 383-384; 193 NW2d 796 (1971); ***C F Smith Co v Fitzgerald***, 270 Mich 659, 681; 259 NW 352 (1935); ***People v Gibbs***, 186 Mich 127, 134-135; 152 NW 1053 (1915). As the court of appeals implicitly recognized, it would be equally damaging -- and contrary to public policy -- to subject legislators or other governmental decision makers to the ordeal of having their motivations dissected in discovery and trial in a context such as the instant case presents. Furthermore, it would be incredibly destructive to the democratic process.

3. To hold petitioners liable for government action would discourage political participation.

The Supreme Court in *Noerr* recognized that it is imperative in a representative democracy that citizens be able freely to communicate with their government. Government needs the input of citizens and citizens need to be able freely to provide their input. It is readily apparent that free communication would be discouraged if citizens could be held responsible for the governmental action which they urge. In fact, businesses have used suits against petitioners precisely for the purpose of discouraging public participation, and opposition to their plans. *See* n.13, *infra.* Virtually every commentator on the state of American democracy notes and laments the lack of a public interest and participation. The court of appeals was correct in not allowing political participation to be penalized.

4. To hold petitioners liable for government action would multiply litigation.

Let there be no mistake about it. What appellant J & J Construction asks this court to create is a new cause of action – lobbyists' liability. If the Court accepts this argument, then in the future, whenever a governmental body or official does something which causes someone economic or other injury, then the aggrieved party will be able to sue the persons or companies which urged that government action. This would multiply litigation, and, as noted, ensnare public officials in that litigation, even if the government itself and its officials are immune from liability. Courts around this country have declined to allow lobbyists' liability for all of the reasons discussed above. The court of appeals was correct in rejecting this new cause of action and refusing to permit this multiplication of litigation. The decision of the court of appeals should be affirmed.

H. Plaintiff-Appellant's attempts to distinguish the *Noerr-Pennington* line of cases are futile.

Appellant attempts to explain why petitioning immunity does not protect the Defendants and ends up with the assertion (at page 39 of its brief) that the principle to be drawn from the ***Noerr-Pennington*** line of cases is, not that all petitioning is protected, but that "where a defendant's conduct constitutes *protected* petitioning, that conduct cannot form the basis for liability." In other words, when petitioning is protected it is protected. The necessary converse, J & J continues, is that when petitioning is not protected by the petition clause it can be the basis for damages. In other words, when petitioning is not protected it is not protected. No matter how many times one reads this, one cannot find the sense in it.

What the ***Noerr-Pennington*** line of cases stands for is the proposition that **all** petitioning activity is protected when someone seeks to hold those who petition government liable for the

actions of government which may have been induced by the petitioning. The motivation for the petitioning activity may be honorable or base. The statements may be negligent half-truths or deliberate misstatements or falsehoods. That matters not. If government responds favorably to the petition, the petitioner is not liable for the actions taken by the government. It must be emphasized that in its interference with contract claim, the appellant sought to hold the defendants liable for the decision of the Wayne City Council not to contract with it for the performance of masonry work. What all of the cases recognize is that citizens have a right, protected by the petition clause of the First Amendment, to urge government to act in a particular fashion. Government is then responsible for what it does. The petitioners -- the lobbyists -- cannot be held financially liable for the consequences of governmental action and the court of appeals correctly so held.

Appellant attempts to distinguish the ***Noerr-Pennington*** cases by arguing that petitioning is not protected if it is defamatory, citing ***McDonald v Smith***, 472 US 479; 105 S Ct 2787; 86 L Ed 2d 384 (1985). ***McDonald*** does not so hold. That case, which will be discussed in greater depth, *infra*, in the section addressing the defamation issue, holds that a party is not absolutely protected from liability for defamation if he makes knowingly false or recklessly false statements in the course of petitioning. However, the ***Noerr-Pennington*** doctrine deals not with defamation cases, which seek to remedy injuries to reputation, but rather with causes of action, such as interference with contract, which seek to hold a petitioner liable for the consequences of government activity. J & J alleges two causes of action which grow out of two asserted and distinct injuries. J & J says that the statements made by Mark King when he addressed the Wayne City Council were false, and injured its reputation, and, thus, constituted defamation. J & J also says that the statements caused the City Council to deprive it of a contract, thereby interfering with its contractual expectation and causing

it to lose the profits it would have earned from performing the contract. J & J confuses these two causes of action by referring to "interference by defamation" but the two causes of action are distinct and require distinct legal analysis. As the court of appeals correctly recognized, ***Noerr-Pennington*** absolute immunity protected the defendants from liability for intentional interference with business expectancy arising from the decision of the Wayne City Council to award the contract to a bidder other than J & J.

II. THE CLAIM FOR TORTIOUS INTERFERENCE WITH BUSINESS EXPECTANCY IS ALSO PREEMPTED BY FEDERAL LABOR LAW. THE NATIONAL LABOR RELATIONS BOARD HAS EXCLUSIVE JURISDICTION OVER CONDUCT WHICH ACTUALLY OR ARGUABLY CONSTITUTES UNLAWFUL SECONDARY ACTIVITY.

The court of appeals erred in rejecting the defendants' argument that the cause of action for interference with contract was preempted by the National Labor Relations Act. Had the court of appeals correctly decided that issue, it would have had an additional and independent ground for concluding that the tortious interference with a business expectancy claim had to be dismissed, and this court is free to rely upon that additional and independent ground to affirm the decision of the court of appeals.

A. Federal labor law preempts state law claims of tortious interference with business expectancy based upon a union's arguably improper request to any person to cease doing business with another person.

In enacting the National Labor Relations Act ("NLRA"), 29 USC §§ 150 et seq, the United States Congress established a national scheme for regulating disputes between labor and management. 29 USC § 151 (expressly declaring the labor relations established in the NLRA to be "the policy of the United States"); ***San Diego Building Trades Council v Garmon***, 359 US 236, 239; 79 S Ct 773; 3 L Ed 2d 775 (1959) (describing the NLRA as "[t]he comprehensive regulation

of industrial relations by Congress").[8] The NLRA regulates labor disputes by establishing rights in §7, 29 USC §157, and prohibitions in §8, 29 USC §158. The National Labor Relations Board ("NLRB"), an agency of the United States government, enforces both the rights and the prohibitions of the NLRA. Under §7, for example, employees may form, join, or assist unions, may bargain collectively, and may engage in other concerted activities for their mutual aid and protection.[9] Under §8, for example, employers are prohibited from interfering with the exercise of rights granted in § 7 and unions are prohibited from forcing any person to cease doing business with any other person -- from engaging in unlawful "secondary" activity.[10]

Consistent with the broad regulatory purposes of the NLRA, the United States Supreme Court has held repeatedly that the NLRA preempts any state law claim based upon actions which the NLRA even arguably protects or prohibits. The seminal case is ***San Diego Building Trades Council v Garmon***, *supra*. There, the Supreme Court explained the rule of federal preemption by the NLRA:

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[8] Congress amended and expanded the NLRA with the Labor Management Relations Act, 1947, ("LMRA") 29 USC §§185 et seq. This brief refers to the NLRA as inclusive of this amendment.

[9] Section 7 reads in full: "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3)."

[10] Section 8 is too lengthy to quote in full. However, the subsection used as an example reads in relevant part as follows: "[a labor organization commits an unfair labor practice by] forcing or requiring any person . . . to cease doing business with any other person . . . ." 29 USC § 158(b)(4)(B).

> When an activity is arguably subject to § 7 or § 8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national labor policy is to be averted. *Id.* at 245.

So long as "the activity regulated" is not "a merely peripheral concern" of federal labor laws or does not touch interests "deeply rooted in local feeling and responsibility," federal labor law preempts the state law claim. *Id.* at 243-244.[11]

The Michigan courts have followed these decisions faithfully, protecting both state and federal interests in their case law. *See, e.g.,* ***Cross Co v UAW Local No 155***, 371 Mich 184, 197; 123 NW2d 215 (1963) (state court may not enjoin peaceful picketing and may only enjoin violent picketing if there is a "clearly persuasive showing of imminent and irreparable injury beyond the power of the regularly constituted police authorities of the community to control"); ***AFSCME v Mental Health Dep't***, 215 Mich App 1; 545 NW 2d 363 (1996) (Michigan Employment Relations Commission was preempted of jurisdiction because it was **arguable** that the NLRB would assert jurisdiction over the employer).

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11 Matters "deeply rooted in local feeling" include threats, property damage, trespass, and injury to persons. However, courts preempt state law claims to the extent that they are not central to state responsibility. ***See Linn v United Plant Guard Workers of Am***, 383 US 53; 86 S Ct 657; 15 L Ed 2d 582 (1966) (defamation is preempted, but defamation with malice is not); ***Youngdahl v Rainfair, Inc***, 355 US 131; 78 S Ct 206; 2 L Ed 2d 151 (1957) (state suits over peaceful picketing are preempted, but state suits over picket line violence are not). ***Accord Sears, Roebuck & Co v San Diego County Dist Council of Carpenters***, 436 US 180; 98 S Ct 1745; 56 L Ed 2d 209 (1978) (state trespass claim not preempted); ***Farmer v United Brotherhood of Carpenters***, 430 US 290; 97 S Ct 1056; 51 L Ed 2d 338 (1977) (state intentional infliction of emotional distress not preempted, as based on threats and intimidation); ***Belknap, Inc v Hale***, 463 US 591; 103 S Ct 3172; 77 L Ed 2d 798 (1983) (state breach of contract claim not preempted for replacement workers discharged upon displacement by returning strikers; there, NLRA was concerned only with rights of strikers to return to jobs).

In order to advance their interests, unions may very well seek to "interfere with contracts," and they often may do so lawfully. What they can and cannot do in this arena is largely defined by the prohibition against engaging in certain kinds of secondary activity, as set forth in Section 8(b)(4) of the Act and in the case law interpreting it. What they can and cannot do is determined by the National Labor Relations Board in the first instance and by the appellate courts which review the NLRB decisions. It is not for state or federal courts to consider when interference with contract is lawful under section 8(b)(4) and when it is prohibited. Courts have repeatedly held that actions for tortious interference with contract (or business relationship or expectancy) are preempted by the NLRA. ***Teamsters, Local 20 v Morton***, 377 US 252; 84 S Ct 1253; 12 L Ed 2d 280 (1964) (state court action for damages arising out of peaceful picketing and peaceful appeals to cease doing business with employer preempted by NLRA); ***Local 926, International Union of Operating Engineers v Jones***, 460 US 669; 103 S Ct 1453; 75 L Ed 2d 368 (1983) (supervisor's action against union for interference with contractual relations preempted by NLRA); ***Falls Stamping and Welding Co v International Union, UAW***, 744 F2d 521 (CA 6, 1984) (employer's state law claim for tortious interference with business preempted by NLRA, in that alleged tort was at heart of labor dispute); ***Beverly Hills Foodland, Inc v United Food & Commercial Workers Union, Local 655***, 39 F3d 191 (CA 8, 1994) (action for tortious interference with contract preempted by NLRA because union's activities occurred in context of labor dispute). Actions alleging interference with contract go to the core of the NLRA. They are not of merely peripheral concern nor are they deeply rooted in local feelings and interests.

It is clear that the court of appeals did not understand the nature of lawful or unlawful secondary activity, a fact which is not surprising since state courts so seldom deal with it for the very

reason that it is preempted. It is also often an area of great complexity, with the statutory language being nearly incomprehensible and requiring sentence diagraming skills possessed by few. But the instant fact situation is not so complex. As discussed in connection with the defamation claim, *infra* at Section III, Bricklayers Local 1 had a labor dispute with J & J Construction. J & J was the primary employer. The Wayne City Council is a secondary employer. The union appealed to the secondary -- Wayne -- to cease doing business with the primary -- J & J. A request to a secondary employer's managerial employee or decision makers (here the city council) to cease doing business with the primary with whom the union has a dispute is lawful secondary activity. A peaceful request to a secondary is protected by the First Amendment and the labor law. The NLRA has been interpreted not to prevent it, meaning that it is not a union unfair labor practice. ***NLRB v Servette, Inc,*** 377 US 46; 84 S Ct 1098; 12 L Ed 2d 121 (1964). If the union, by contrast, had picketed the City of Wayne, in order to pressure the City to stop doing business with J & J, there might have been unlawful secondary activity.

Section 8(b)(4) of the NLRA sets forth the parameters of prohibited secondary activity, always at issue in tortious interference claims. So does § 303 of the LMRA, 29 USC § 187 -- the 1947 amendment to the NLRA. These statutory provisions **completely preempt** state law claims, including tortious interference with business relations, which arise from a union's arguably improper persuasion of a person not to do business with another person. "In short, this is an area 'of judicial decision within which the policy of the law is so dominated by the sweep of federal statutes that legal relations which they affect must be deemed governed by federal law having its source in those statutes, rather than by local law.'" ***Teamsters Local 20***, 377 US at 260 (§303 of LMRA completely preempted tortious interference with business relations claim under state law) (quoting ***Sola Electric***

Co v Jefferson Electric Co, 317 US 173, 176; 63 S Ct 172; 87 L Ed 165 (1942)).

This Court should conclude that federal preemption is an additional reason why the court of appeals was correct in concluding that Plaintiff-Appellant's claim for tortious interference with a business expectancy should have been dismissed.

III. AS TO THE DEFAMATION CLAIM, THE PETITION CLAUSE OF THE FIRST AMENDMENT CONFERRED A QUALIFIED PRIVILEGE UPON THE DEFENDANTS' SPEECH TO THE WAYNE CITY COUNCIL.

A. Standard of Review

Defendants-Appellees that the standard of review is *de novo.*

B. Summary of Argument

There is no dispute that Mark King petitioned the government – the Wayne City Council – at a meeting open to the public for comments, discussion, and debate. The court of appeals below held that the Petition Clause of the First Amendment conferred a qualified privilege for statements made in such a context as petitioning the government. J & J asserts, however, that petitioning the government is not entitled to a qualified privilege if the content of the speech is not in reference to a "public figure." This assertion fundamentally misapprehends the nature and purpose of the Petition Clause as well as First Amendment jurisprudence generally. To the contrary, the United States Supreme Court, the Sixth Circuit Court of Appeals, the Michigan courts, and the majority of other jurisdictions have all held that the Petition Clause provides a qualified privilege against defamation claims regardless of the person or matter under discussion. The critical inquiry here is whether the government is petitioned, not whether the content of the petitioner's speech refers to a "public figure."

Furthermore, Mark King's comments to the Wayne City Council were also protected by a

qualified privilege for the independent and sufficient reason that his speech occurred in the context of a labor dispute. In ***Linn v United Plant Guard Workers***, 383 US 53; 86 S Ct 657; 15 L Ed 2d 582 (1996), and ***Letter Carriers v Austin***, 418 US 264; 94 S Ct 2770; 41 L Ed 2d 745 (1974), the United States Supreme Court held that because state court defamation suits arising in the context of labor disputes had the potential to interfere with the exercise of federal rights protected by the National Labor Relations Act, such suits could be maintained only if the ***New York Times v Sullivan*** standard were applied. The definition of a "labor dispute" under the National Labor Relations Act is broad, as the US Supreme Court has held repeatedly over a line of cases from 1937, and as the federal statute itself states: a "labor dispute" is "*any controversy concerning terms, tenure or conditions of employment*, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, *regardless of whether the disputants stand in the proximate relation of employer and employee*." 29 USC § 113(c) [emphasis added]. Here, Mark King urged the council to award its contract to a union contractor, not a non-union contractor, and he questioned whether J & J, a non-union contractor whom the Bricklayers had been picketing, paid prevailing wage – which in fact it did not. This is plainly labor dispute speech entitled to a qualified privilege from defamation claims.

C. Mark King's speech to the Wayne City Council was protected by a qualified privilege against defamation claims because he was petitioning government.

1. The United States Supreme Court, the Sixth Circuit Court of Appeals, and the Michigan Court of Appeals recognize a qualified privilege for speech in the context of petitioning the government.

The lead decision is ***McDonald v Smith***, *supra*, where the Supreme Court was faced with the case of a plaintiff who had unsuccessfully sought an appointment as a United States Attorney and

who brought a defamation action against a man who had written allegedly defamatory letters about him to President Reagan, with copies to other government officials. The Court rejected the argument that because the letters were sent in the course of petitioning activity the statements in them were **absolutely privileged**. The Court said, however, that in order to give the necessary protection to the right of petition, such statements are **qualifiedly privileged** and must be judged by the standard enunciated in ***New York Times v Sullivan,*** 376 US 254; 84 S Ct 710; 11 L Ed 2d 686 (1964).

This standard, known as actual malice, is that there can be no liability unless the plaintiff proves that the statement at issue was not simply false, but also that the defendant uttered the statement with knowledge that it was false or with reckless disregard of the truth. Simply put, the plaintiff must show defamation with malice.

In ***Azzar***, *supra*, the Michigan Court of Appeals, citing ***McDonald***, recognized that **knowing and malicious** falsehoods made in the course of petitioning activity can be challenged in a defamation action, although it emphasized that care must be taken that defamation not be used to vitiate the absolute First Amendment protection afforded by ***Noerr-Pennington***. After first observing that:

> [a]llegations in a complaint of knowing falsehoods are generally protected from liability under the First Amendment right to petition because citizens would be deterred from petitioning the government if that were not so . . .,

the court went on to say that:

> Nevertheless, **knowingly and maliciously** made allegations in petitions to government are not protected under the First Amendment from liability for defamation. ***McDonald v Smith***, 472 US 479. ***Azzar***, *supra* at 517-518 (emphasis added.)

Courts have repeatedly recognized that the First Amendment requires protection for petitions

to public bodies even when the speech is outrageous, unfair, misleading, or just plain untrue. For example, in ***Stachura v Truszkowski***, 763 F2d 211 (CA 6, 1985), rev'd in part on other grounds sub nom. ***Memphis Community School Dist v Stachura***, 477 US 299; 106 S Ct 2537; 91 L Ed 2d 249 (1986), the defendant made outrageous complaints to a school board about a teacher, which ultimately resulted in the teacher's discharge. While the statements were clearly unsupported and insupportable, the Sixth Circuit agreed with the trial court that the First Amendment immunized the defendant from liability for defamation. ***Stachura*** was cited approvingly by the Michigan Court of Appeals in ***Arim***, *supra* at 193.

Similarly, in ***Eaton v Newport Board of Education***, 975 F2d 292 (CA 6, 1992), a union and its agent were active in a campaign before the school board to remove a school principal from his position because of a single racist comment he had made to a school employee. The union called the principal, Eaton, a racist before the school board. The court rejected Eaton's argument that characterizing him as a racist based on this one incident was neither reasonable nor fair, observing that, "[a] citizens's right to petition is not limited to goals that are deemed worthy, and the citizen's right to speak freely is not limited to fair comments." *Id.* at 298. The court held that the statements were protected by the First Amendment's guarantee of free speech.

The court in ***Eaton*** relied on ***Stevens v Tillman***, 855 F2d 394 (CA 7, 1988), a similar case, in which a school principal, who was removed from her position because of allegations both of racism and of incompetence, sued the parents who were her accusers and who had leveled these charges, both before the school board and in a community campaign aimed at influencing the school board. While recognizing that ***McDonald v Smith***, *supra*, permits a suit for defamation even regarding statements made in the course of petitioning government, the court emphasized the very

limited circumstances in which liability for such statements could be imposed, observing as follows:

> The first amendment prohibits efforts to insure "laboratory conditions" in politics; **speech rather than damages is the right response** to distorted presentations and overblown rhetoric. A campaign to influence the Board of Education is classic political speech; it is direct involvement in governance, and only the most extraordinary showing would permit an award of damages on its account. The district court did not err in instructing the jury that only evidence satisfying the ***New York Times*** standard would permit an award of damages. *Id.* at 403. (emphasis added.)

As the Seventh Circuit Court of Appeals has recognized, political speech must be protected and, if false or inaccurate, it should be countered by speech, not by an action for damages.

In the instant case, the comments of Mr. King were actually countered by a report from Barton Malow, the construction manager of the Wayne Aquatic Center. When faced with Mr. King's statements of concern about the quality of the work done by J & J, the Wayne City Council referred the matter back to the administration. Then, Barton Malow, the construction manager, did an investigation of the quality of J & J's work and made a report to the city which was reviewed by the City Council. In this report, Barton Malow said that it had reviewed J & J's past jobs and that the quality was good. *[Appendix, pp. 001b-012b].* Barton Malow, which was in the employ of the City of Wayne, thus countered the opinion of Mr. King, who was in the employ of the Bricklayers Union. This furtherance of debate – not an action for damages as brought by J & J – is the appropriate response under the First Amendment.

Moreover, the First Amendment right to petition does not depend upon whether the speaker discusses a public figure or a matter of public concern; the petition can concern the private business interests of the speaker. In ***Gable v Lewis***, 201 F3d 769 (CA 6, 2000), the Sixth Circuit Court of Appeals upheld that principle and affirmed a jury verdict in favor of a woman whose right to petition

was violated by the retaliatory conduct of a state official – after the plaintiff in ***Gable*** had filed a discrimination complaint (i.e. petitioned the government), the defendant removed her from a towing referral list maintained by the state highway patrol. The defendant official argued that the Petition Clause was "inapplicable" because her discrimination complaint was of "personal" not "public" concern. The Sixth Circuit rejected this argument, because "the law is clearly established that the 'public concern test' does not apply to petitioning activity in the instant case." *Id* at 771.

The Sixth Circuit in ***Gable*** explicitly rejected the notion that the Petition Clause was limited in that case by a "public concern" test under ***Connick v Myers***, 461 US 138; 103 S Ct 1684; 75 L Ed 2d 708 (1983) – a test in which the government acting as an employer can discipline an employee unless the employee spoke out on matters of "public concern." Finding that the plaintiff in ***Gable*** was not an "employee" who could fall under the ***Connick*** public concern test, the Sixth Circuit afforded plaintiff the complete protection of the Petition Clause. The Sixth Circuit also dispensed with the argument that the Petition Clause did not encompass the plaintiff's speech (complaint) on the basis that it concerned her business and commercial interests. As made clear by the United States Supreme Court, the Petition Clause protected complaints "respecting resolution of their [petitioners'] business and economic interests . . . ." 201 F3d at 771 (quoting ***California Transport v Trucking Unlimited***, 404 US 508, 511 (1972), brackets by Sixth Circuit). The Sixth Circuit concluded: "[T]here is no basis in our First Amendment jurisprudence for applying ***Connick***'s public concern test to petitioning activity by a private business woman who is simply supplying services to a governmental agency as an independent contractor." 201 F3d at 772.

In sum, these lines of cases from the United States Supreme Court, the Sixth Circuit Court of Appeals, and the Michigan Court of Appeals, all hold that the Petition Clause confers a qualified

privilege against defamation suits, irrespective of whether the government petitioner speaks of public figures, public concerns, or commercial interests. Mark King's motives are irrelevant. Whether J & J is a public or private figure is irrelevant. What matters under the Petition Clause is that Mark King petitioned Wayne City Council at a public meeting. On this basis, as the court of appeals below correctly found, King's speech received a qualified privilege against J & J's defamation claim. This finding should be affirmed.

2. The panel's conclusion was properly supported by *New York Times v Sullivan*.

The landmark case of ***New York Times v Sullivan*** provides a thorough discussion of First Amendment jurisprudence and the reasons for a qualified privilege against defamation claims – to assure robust debate in a democratic society. The court of appeals in this case properly analyzed ***Sullivan*** in conjunction with ***McDonald v Smith, supra,*** because the ***McDonald*** Court itself relied upon ***Sullivan*** to hold that the standard of defamation liability in a Petition Clause case is met only when the defendant speaks a known falsehood or in reckless disregard of the truth. *[Appendix, p 105a].* Although J & J asserts that "nothing" in ***New York Times v Sullivan*** supports the conclusion that Mark King's statements to the Wayne City Council were protected by a qualified privilege, this assertion underscores the basic misperception by J & J about First Amendment jurisprudence – the misperception that speech must concern a public figure in order to receive First Amendment protection. In fact, the US Supreme Court in ***Sullivan*** rejected many of the arguments asserted by J & J in this case as a basis for restricting the protective ambit of the First Amendment. For instance, the Court rejected the ***Sullivan*** plaintiff's oversimplified analysis of the First Amendment, advanced by J & J here, that, "The First Amendment of the U.S. Constitution does not protect libelous

publications." 376 US at 264, 268. The Court emphasized the breadth and importance of the First Amendment, reminding the lower courts that even "erroneous statement . . . must be protected if the freedoms of expression are to have the 'breathing space' that they 'need . . . to survive' . . . ." 376 US at 271-272 (quoting ***NAACP v Button***, 371 US 415, 433; 83 S Ct 328; 9 L Ed 2d 405 (1963))[12]

The Court also rejected the theory, advanced by J & J here, that the speech at issue could be characterized as implicating "commercial" concerns and thereby would lose all First Amendment protection. Instead, the Court explained, the speech at issue "communicated information, expressed opinion, recited grievances, protested claimed abuses, and sought financial support on behalf of a movement whose existence and objectives are matters of the highest public interest and concern." 376 US at 266. The Court thus dispelled the "commercial concern" theory by invoking the First Amendment rights of free speech and press generally, which included a "public figure" doctrine, but was not limited to a "public figure" doctrine (as argued by J & J). *See also,* ***Gable v Lewis****, supra.*

The Court's broad discussion of First Amendment freedoms in ***Sullivan*** stands in marked contrast to other decisions by the Court which narrowly focused on one portion of the First Amendment, as the Court in ***McDonald v Smith*** focused on the Petition Clause. Although J & J seeks to confine the ***Sullivan*** case to a public figure doctrine, numerous courts have concluded that ***Sullivan*** is not so limited and have even cited the ***Sullivan*** decision in the context of the Petition Clause. For example, in ***Stern v United States Gypsum, Inc***, 547 F2d 1329, 1342 (CA 7, 1977),

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[12]The ***Sullivan*** plaintiff's argument that the First Amendment does not protect "libelous publications" is almost identical to the tautological reasoning of J & J that "where a defendant's conduct constitutes *protected* petitioning, that conduct cannot form the basis for liability." (J & J Brief, p 39) In other words, according to J & J, the First Amendment only protects what is not tortious. There would, of course, be no need or practical use for the First Amendment against tort liability if it only protected what is not tortious.

the court cited ***New York Times v Sullivan*** in applying the Petition Clause to confer absolute immunity from suit under 42 USC §1985. For another example, in the case discussed by J & J, ***Cardtoons, Inc v Major League Baseball Players Ass'n***, 208 F3d 885 (CA 10, 2000), the court explicitly noted the connection between the qualified privilege set forth in ***New York Times v Sullivan*** and petitioning activity – a connection made by the Supreme Court itself.

> Relying on ***White v Nicholls***, 44 US (3 How) 266, 11 LEd 591 (1845), and ***New York Times Co v Sullivan***, 376 US 254, 84 S Ct 710, 11 LEd2d 686 (1964), the Court held that the petitioning activity was not immune from liability for libel if carried out with actual malice, that is, "falsehood and the absence of probable cause." ***Cardtoons***, 208 F3d at 901, (quoting ***McDonald v Smith***, 472 US at 484).

That citation points out the most important reliance on ***New York Times v Sullivan*** in a Petition Clause case: the decision of ***McDonald v Smith***, which explicitly applied the actual malice standard in the context of the Petition Clause, without ever mentioning a "public figure" doctrine as suggested by J & J.

In sum, the decision in ***New York Times v Sullivan*** is fully applicable to this Petition Clause case. The Supreme Court itself invoked ***Sullivan*** in the Petition Clause case of ***McDonald v Smith***. For ***Sullivan*** supports and provides essential reasoning for the conclusion that a qualified privilege is necessary to ensure, as in this case, that "freedoms of expression" have "the 'breathing space' they 'need to survive'" [376 US at 271-272] against the suffocating effects of a defamation claim.

3. The court of appeals' opinion did not "make new law," but rather continued the binding precedents of *Arim* and *Azzar*.

As explained above, the court of appeals in this case followed the decisions of ***Arim*** and ***Azzar*** in deciding that the statements made by Mark King to the Wayne City Council were protected by a qualified privilege against J & J's defamation claim. The opinion in ***Azzar*** set forth the reasons

for, as well as the scope and application of, a qualified privilege for such a governmental petition. As the court in ***Azzar*** explained: "Allegations in a complaint of knowing falsehoods are generally protected from liability under the First Amendment right to petition because citizens would be deterred from petitioning the government if that were not so . . . ." The court went on: "Nevertheless, knowingly and maliciously made allegations in petitions to government are not protected under the First Amendment from liability for defamation." ***Azzar, supra*** at 517-518 (citing ***McDonald v Smith***, 472 US 479). In short, statements in a governmental petition are entitled to a qualified but not absolute privilege from defamation claims. This is the balanced approach to defamation claims established by the US Supreme Court in ***McDonald v Smith***, and used by the court below to conclude that Mark King's statements to the City County were protected by a qualified privilege.

A contrary result is not dictated by the non-binding and erroneous decision of ***Hodgins Kennels, Inc v Durbin***, 170 Mich App 474; 429 NW2d 189 (1988). The ***Hodgins*** decision was rendered prior to November 1, 1990. Pursuant to MCR 7.215(I)(1), it did not constitute binding precedent for the panel below. The decisions of ***Azzar*** and ***Arim***, which post-date 1990 and are consistent with the decisions of the United States Supreme Court and the Sixth Circuit, did constitute binding precedent for the panel. Moreover, as explained above, it is an incorrect statement of the law to say that the Petition Clause only protects statements regarding a "public figure." ***Hodgins*** was wrong to the extent it stated otherwise. If ***Hodgins*** were correct that the Petition Clause only protects statements regarding a "public figure," then the Petition Clause would be a redundancy for purposes of defamation law. For a qualified privilege attaches to **any** statement regarding a "public figure." *See, e.g.,* ***Gertz v Welch***, 418 US 323, 344-345; 94 S Ct 2997; 41 LEd2d 789 (1974).

The legal error in ***Hodgins*** has only been committed in one other decision cited by Plaintiff J & J: ***IBP Confidential Business Documents Litigation***, 797 F2d 632 (CA 8, 1986), which has been described as an "aberration" for its failure to comprehend ***McDonald v Smith***'s reliance on the actual malice standard entirely apart from the "public figure" doctrine. *See* Aaron Gary, *First Amendment Petition Clause Immunity from Tort Suits: In Search of a Consistent Doctrinal Framework*, 33 Idaho L Rev 67, 109 n 246 (1996). Nor can J & J bolster the erroneous holding of ***Hodgins*** with the Michigan defamation statute, MCL 600.2911. Like any other statute, this defamation statute cannot diminish constitutional rights and protections established in the First Amendment. *See, e. g.*, ***First National Bank of Boston v Bellotti***, 435 US 765; 98 S Ct 1407; 55 L Ed 2d 707 (1978)(holding that state law could not restrict First Amendment rights of corporations; invalidating state law to the extent it tried); ***Sullivan***, 376 US at 268 (explaining that it is the "rule of liability," under state law, which cannot abridge the freedom of speech and press "guaranteed by the First and Fourteenth Amendments.")

Another decision cited and relied upon by J & J is the unpublished decision in ***Dobkin v Johns Hopkins University***, 172 F3d 43 (CA 4, 1999) (1999 US App LEXIS 725), which does not refute the application of a qualified privilege against defamation claims when the speech is made in the course of petitioning government. In ***Dobkin***, the Fourth Circuit Court of Appeals declined to apply the actual malice standard under the Petition Clause because the statements at issue did not constitute petitioning government. The allegedly defamatory letters had been sent to four private parties as well as to two public officials. As the court explained: "some of the letters at issue were sent to Hillary Clinton, Thomas Sowell, Ross Perot, and William Kunstler. These individuals were not public officials and letters to them would not qualify as petitioning the government." *[Appendix,*

p. 112a] Consequently, the Fourth Circuit chose not to apply the actual malice standard under the Petition Clause *because there was no petitioning of government*, not because the allegedly defamed persons were not "public figures."

Thus the isolated decisions of ***Hodgins*** and ***IBP*** stand in contrast to the majority of jurisdictions which have held that the Petition Clause does grant a qualified privilege against defamation claims, and an absolute privilege against all other tort claims, for statements made in the course of petitioning government. *See, e.g.,* ***Bradley v Computer Sciences Corp***, 643 F2d 1029, 1033 (CA 4, 1981) (granting qualified privilege under Petition Clause for complaints to government officials about conduct of subordinates, regardless of motive behind the complaints); ***Miner v Novotny***, 498 A2d 269, 271-272 (Md, 1985) (relying upon ***McDonald v Smith***, *supra,* and providing qualified privilege under Petition Clause for complaint to sheriff's office, and an absolute privilege for certain testimony given in administrative proceedings); ***Gunderson v University of Alaska***, 902 P2d 323 (Alaska, 1995) (granting absolute immunity from tort liability under Petition Clause and ***Noerr-Pennington*** doctrine for protest to public entity about a commercial contract between a private contractor and the public entity); ***Smith v Silvey***, 197 Cal Rptr 15, 19 (Cal Ct App 1983) (dissolving injunction which had restrained person from initiating complaints with public agencies, as an infringement upon his rights to free speech and to petition under the US and State Constitutions).

Collectively these decisions represent the majority rule applied by the Michigan court of appeals in this case and in ***Arim*** and ***Azzar***: the rule that the Petition Clause provides a qualified privilege against defamation claims where, as here, the statements were made in the course of

petitioning government.

4. The Court of Appeals' opinion did not create "higher" protection for some First Amendment rights in contravention of the United States Supreme Court's instructions.

The qualified privilege for statements made in the course of petitioning government does not place "petitioning activity in a special category not enjoyed by other First Amendment guarantees of free speech and free press." (J & J's Brief, p 28) Rather, the qualified privilege for such petitioning speech ensures equal footing of speech to the government with other First Amendment speech, such as statements in a political campaign, which the US Supreme Court has protected from "chilling" litigation such as this.

J & J asserts that the court of appeals below misconstrued ***McDonald v Smith***, *supra*, which, according to J & J, stands for the proposition that the Petition Clause confers no privilege whatsoever to governmental petitions and provides no "elevated" privileges of speech. The error in J & J's analysis can be traced to its selective quotation of ***McDonald v Smith***, that "there is no sound basis for granting greater constitutional protection for statements made in a petition to the President than other First Amendment protections." (J & J's Brief, p 29, quoting ***McDonald***, 472 US at 485.) J & J fails to acknowledge that the US Supreme Court made that statement in the course of explaining why petitioning is entitled to a qualified privilege rather than an absolute privilege in a defamation action. As the Court explained: "To accept petitioner's claim of absolute immunity would elevate the Petition Clause to special First Amendment status." 472 US at 485. The Court refused to grant "greater constitutional protection" to petitioning speech in the form of **absolute** immunity from defamation suits, but was careful to emphasize that a **qualified** privilege was necessary to safeguard the Petition Clause. 472 US at 485.

Thus, J & J makes a misdirected argument when it argues that petitioning statements are entitled to "no greater protection" than statements made by the press concerning private figures. (*See* J & J's Brief, pp 28-35, discussing the freedom-of-press cases ***Gertz v Welch***, 418 US 323; 94 S Ct 2997; 41 LEd2d 789 (1974), ***Philadelphia Newspapers, Inc v Hepps***, 475 US 767; 106 S Ct 1558; 89 LEd2d 783 (1986), and ***Rouch v Enquirer & News of Battle Creek***, 427 Mich 157; 398 NW2d 245 (1987)). The private-figure/public-figure distinction does not define the protective parameters of the Petition Clause. Presumably the Supreme Court knew its own decision in ***Gertz v Welch***, yet the Court did not cite ***Gertz v Welch*** or otherwise rely on a "public figure" doctrine in its reasoning in ***McDonald v Smith***. Although there are cases in which the identity of the subject as a public or private figure determines whether the speech is qualifiedly privileged (***New York Times v Sullivan*** was in part such a case), that fact was totally irrelevant in this Petition Clause case. The qualified privilege applied here because of the context in which the speech took place – because it took place in the course of petitioning government.[13]

In short, the court below did not "elevate" petitioning above all other speech. It applied a

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[13] A number of courts and legislatures have come to recognize that permitting defamation actions, even where qualified immunity is the rule, also poses a substantial danger to the right to petition. "Increasingly, Americans who speak out in opposition to private development plans before local zoning boards, testify at school board meetings or circulate petitions to elected officials are finding themselves in court, defending themselves against developers, landowners and even government officials claiming to have been defamed or otherwise injured by public comment." *The Price of Speaking Out*, September, 1996 American Bar Association Journal, pp 48-49. A term has been coined for such actions - - SLAPP suits - - the acronym standing for strategic lawsuits against public participation. While the qualified privilege applicable in such actions because of ***McDonald v Smith, supra***, almost always results in their ultimate dismissal, the trauma and expense of litigation has a substantial deterrent effect on those who would participate in the public dialogue. For this reason, a number of states have enacted anti-SLAPP laws, seeking to increase the judicial protection of petitioning activity. An excellent discussion of this is set forth in the Rhode Island Supreme Court opinion in ***Hometown Properties, Inc, v Fleming***, LLR 1996. RI. 39.

qualified privilege to petitioning as required by ***McDonald v Smith*** and the precedents of the Michigan Court of Appeals in ***Arim*** and ***Azzar*** – all of which have concluded that petitioning is entitled to qualified rather than absolute immunity from defamation liability. It is J & J, rather, which seeks to **degrade** government petitioning to the level of everyday transactions between private parties – as though Mark King's petition to City Council at an open meeting of public discussion was the equivalent of statements made between people contentiously negotiating a contract in a private conference room. There is a distinction between such situations for purposes of the Petition Clause, a distinction which this Court should acknowledge by holding that a qualified privilege attaches to statements made in the course of petitioning government.

D. Defendants' speech was protected by a qualified privilege for the additional reason that it occurred in the context of a labor dispute.

There is a second and equally compelling reason why a qualified privilege protects defendants' speech with regard to the claim for defamation – because it occurred in the context of a labor dispute. The court of appeals below declined to hold that J & J and the defendants were embroiled in a labor dispute, but they should have concluded that there was a labor dispute and this would have been an alternative and independent basis for finding the speech protected by a qualified privilege.

In both ***Linn v United Plant Guard Workers***, 383 US 53; 86 S Ct 657; 15 L Ed 2d 582 (1996), and ***Letter Carriers v Austin***, 418 US 264; 94 S Ct 2770; 41 L Ed 2d 745 (1974), the United States Supreme Court held that because state court defamation suits arising in the context of labor disputes had the potential to interfere with the exercise of rights protected by the National Labor Relations Act, such suits could be maintained only if the ***New York Times v Sullivan*** standard were

applied, stating:

> We therefore limit the availability of state remedies for libel to those instances in which the complainant can show that the defamatory statements were circulated with malice and caused him damage. ***Linn***, 383 US at 64-65.

Summarizing its ***Linn*** holding in ***Austin***, the Supreme Court said:

> [L]ibel actions under state law were pre-empted by the federal labor laws to the extent that the State sought to make actionable defamatory statements in labor disputes which were published without knowledge of their falsity or reckless disregard for the truth. ***Austin***, 418 US at 273.

The ***Austin*** Court rejected the contention that because there was no immediate dispute between management and labor there was no "labor dispute," observing that "whether Linn's partial preemption of state libel remedies is applicable obviously cannot depend on some abstract notion of what constitutes a "labor dispute." ***Austin***, 418 US at 279.

Nevertheless, the courts below held the ***Linn*** and ***Austin*** qualified privilege standard to be inapplicable because, they concluded, the speech to the Wayne City Council did not occur in the context of a labor dispute. The courts were clearly wrong and should have concluded, as an alternate basis for holding a qualified privilege to be required, that it was required because the speech occurred during a labor dispute, as we will briefly discuss.

1. A labor dispute is any controversy over terms, tenure or conditions of employment.

The Norris-LaGuardia Act, 29 USC § 101, et seq, was passed for the express purpose of depriving courts of jurisdiction to issue injunctions in labor disputes. Norris-LaGuardia defined a labor dispute, at 29 USC § 113 (c), as follows:

> The term "labor dispute" includes *any controversy concerning terms, tenure or conditions of employment*, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or

> conditions of employment, *regardless of whether the disputants stand in the proximate relation of employer and employee*. (Emphasis added.)

This definition was adopted verbatim in the National Labor Relations Act, 29 USC § 152 (9), passed in 1935.

The United States Supreme Court has consistently given the broadest interpretation to the term labor dispute, recognizing, as the statute says, that the term includes **any** controversy concerning terms, tenure or conditions of employment. *See* ***New Negro Alliance v Sanitary Grocery Co***, 303 US 552; 58 S Ct 703; 82 L Ed 1012 (1937) (labor dispute where civil rights organization picketed to encourage the employment of African-Americans), ***Marine Cooks & Stewards v Panama Steamship Co***, 362 US 365; 80 S Ct 779; 4 L Ed 2d 797 (1960) (labor dispute where foreign ship employing foreign employees was picketed by union to protest their substandard wages and working conditions), ***Jacksonville Bulk Terminals v Longshoremen***, 457 US 702; 102 S Ct 2673; 73 L Ed 2d 327 (1982) (labor dispute where union struck and picketed to protest the Soviet Union invasion of Afghanistan), and ***Burlington Northern Railroad Co v Maintenance Employees***, 481 US 429; 107 S Ct 1841; 95 L Ed 2d 381 (1987) (labor dispute where union engaged in secondary picketing of employers doing business with struck employees). In none of these cases did a union seek to represent the company's employees at issue through petitions for representation, through negotiations, or through a union election.

The definition of labor dispute alone, notwithstanding the cases interpreting it broadly, makes clear that it does not require actual disputants standing in the relationship of employer and employee – "regardless of whether the disputants stand in the proximate relation of employer and employee." A labor dispute exists if there is any controversy – broadly defined – over wages, hours or terms and

conditions of employment. Indeed, the concept would probably be less capable of the kind of misunderstanding demonstrated by the lower courts here if the words "labor controversy" were used instead of the words "labor dispute."

The Eighth Circuit Court of Appeals in ***Beverly Hills Foodland, Inc v United Food & Commercial Workers Union, Local 655***, 39 F3d 191 (CA 8, 1994), rejected an employer's argument, similar to the argument made by Appellant J & J, and accepted by the courts below, that there was no labor dispute because the union was not attempting to organize the employer's employees and had no relationship of any kind with the employer. There the union was engaged in area standards picketing to protest the employer's payment of substandard wages.[14] Reviewing both the statutory definition of labor dispute, and the case law, the court concluded that because the union picketed to publicize the store's non-union status, wages and benefits, the publicity concerned a "labor dispute," stating:

> Where the union acts for some arguably job-related reason and not out of pure social or political concerns, a 'labor dispute' exists. ***Beverly Hills Foodland, supra*** at 195.

Recently, in ***AFC Roofing & Insulation and Evett v Devlin and Detroit Building Trades Council***, Mich Ct of App No 1884852 (May 16, 1997), (unpublished), the Michigan court of appeals correctly recognized that where a city council was considering passage of a prevailing wage ordinance, a union representative's comment[15] at the council meeting occurred during a labor

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[14] Area standards picketing is picketing to inform the public that a particular employer does not pay wages and benefits equal to union wages and benefits.

[15] The union representative's comment giving rise to the suit was not directed to the subject of prevailing wage, but rather to hiring practices. After Evett had spoken on the matter, Devlin stated, "That man is not beyond the point of committing unscrupulous acts. I have here in my hand a statement from the Immigration and Naturalization Service citing AFC about hiring

dispute, thereby requiring the application of the qualified privilege when he was sued in defamation for that comment. Citing the NLRA definition of labor dispute, quoted above, as **any** controversy involving terms and conditions of employment, the court concluded that because of the subject matter of the meeting and because of Devlin's comment there was a labor dispute.

Explicitly relying on ***Linn v United Plant Guard Workers, supra***, the court of appeals held in ***AFC Roofing*** that Devlin's statement could not give rise to liability for defamation because there was clearly no showing of actual malice. While observing that Devlin spoke with little information, and that a reasonable person might have investigated the information which had just been given to him, the court said that Devlin had no reason to believe his information was false and that he was at most negligent, not malicious, as that term is defined by law. Therefore, summary disposition of the suit was appropriate.

2. Mark King's statements were uttered during a labor dispute.

Mark King's speech to the Wayne City Council was clearly uttered in the context of a labor dispute. King urged the council to award its contract to a union contractor, not a non-union contractor, and he questioned whether J & J paid prevailing wage, which, in fact, it did not.

Beverly Hills Foodland and ***AFC Roofing*** are precisely on point. Applying these precedents, it should have been concluded that the instant case involves a "labor dispute." As in ***Beverly Hills Foodland***, this case involves statements by the union representative which concerned the plaintiff's payment of union-scale wages and the plaintiff's non-union status. As in ***Beverly Hills Foodland*** and ***AFC Roofing***, it is irrelevant that the union was not, at the time the statement was

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illegal immigrants."

made, engaged in direct organizational activities among the plaintiff's employees. Moreover, Bricklayers Local 1 had, in fact, repeatedly picketed J & J and other non-union contractors in order to improve and protect the prospects of union members. This demonstrates that not only was there a labor dispute when Mark King spoke at the Wayne City Council meeting but also that there was a continuing labor dispute regarding the non-union operators, including J & J.

In sum, the courts below erred. As a matter of law, the speech of Mark King occurred in the context of a labor dispute and so was protected by a qualified privilege from the defamation claim of J & J Construction.

IV. THERE IS NO REASON TO REMAND THIS CASE TO CIRCUIT COURT.

The court of appeals correctly concluded that the circuit court could impose no liability for interference with contract, because the interference was protected by the First Amendment right to petition. The court of appeals also correctly held that the circuit court erred in imposing liability for defamation because it applied the wrong standard - negligence rather than actual malice. But the court of appeals was incorrect in remanding the case to the circuit court because the factual findings made by the circuit court, when considered in light of the correct legal conclusions of the court of appeals can lead to only one conclusion, that the defamation claim must be dismissed.

The critical factual finding of the circuit court is as follows:

> I do find that these photographs and the statements that were made were made negligently in terms of the defendant's failure to pursue and check the accuracy of what was being represented to the city council. (*Appendix, pp.* 083a-084a)

The critical legal conclusion of the court of appeals, which should be affirmed by this court, is that a negligently false statement occurring in the context of petitioning activity, cannot sustain liability. These two conclusions together necessitate the conclusion that the defamation claim should

have been dismissed. There was no reason to remand the matter to the circuit court for reevaluation of the evidence.

Even more importantly, the conclusion of the court of appeals on the issue of damages also necessitates dismissal rather than remand. The court of appeals concluded that:

> Accordingly, we conclude that plaintiff is not entitled to damages resulting from the loss of the government contract and reverse the trial courts judgment in this regard. (*Appendix, p. 103a*)

The court of appeals also summarized the factual finding of the circuit court as to damages:

> With regard to damages, the court found that plaintiff's business reputation had not been hurt and that damages were limited to the lost profit from the rejected bid, plus interest, costs, and attorney fees. (*Appendix, p. 098a*)

Given the factual conclusion that there was no injury to plaintiff's business reputation and the legal conclusion that plaintiff could not be awarded damages resulting from the loss of the government contract, there was nothing else to be considered. Plaintiff was entitled to nothing and the court of appeals could and should have so concluded. This case should be dismissed in its entirety, not remanded for wasteful and unnecessary proceedings.

CONCLUSION AND RELIEF SOUGHT

In conclusion, Defendants Mark King and Bricklayers Local 1 have established that the decision of the court of appeals was correct; fully consistent with federal and state law regarding First Amendment Petition Clause activity; and advanced important state policies. The decision of the court of appeals should be affirmed, with the modification that there is no need to remand it to the circuit court. Defendants-Appellees submit that the Plaintiff-Appellant's appeal should be denied in its entirety.

Respectfully submitted,

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Dated: August 20, 2002